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OGC Has Reviewed

OGC 75-1905

14 May 1975

MEMORANDUM FOR: Director of Security
Assistant for Coordination/DDA

SUBJECT : Presidential Recordings and Materials
Preservation Act

1. The Presidential Recordings and Materials Preservation Act (P.L. 93-526) became law on 19 December 1974. The Act requires the Government to distinguish between personal and Presidential historical materials. Title I of the Act is concerned with the preservation of, and public access to, the Presidential materials of Richard M. Nixon. Sections 101, 102 and 103 of the Act govern the short-term possession, security and accessibility of the Presidential historical materials. On 14 January 1975, GSA published proposed regulations in the Federal Register to implement those sections. They become effective upon the vacation of outstanding court orders preventing their implementation. Section 104 of the Act governs general public access to the materials. Proposed regulations to implement this section were transmitted to Congress in a report entitled Report to Congress on Title I, Presidential and Materials Preservation Act (P.L. 93-526) via a letter dated 19 March 1975. Unless disapproved by either House of the Congress within 90 days (19 June 1975), the regulations take effect. For some Congressional reaction, see page A3 of the Washington Post of this morning.

2. The Nixon materials now in the custody of the U.S. Government amount to an estimated 35,000 cubic feet. Within this volume may be documents originated within the Agency or documents or information concerning the Agency. The proposed regulations detail how the GSA will proceed to process for eventual public access the entire collection of materials. Pursuant to the Congressional mandate in Section 104(a)(3), the regulations purport to protect the integrity of national security information by restricting it from general public access.

3. Related to restricting national security information the Report, at C-5, states that:

...During the review process, archivists will identify all materials bearing national security classification markings for segregation from other materials being prepared for public access. In addition, archivists will identify and lay aside any materials containing information which appears to be related to national security for later review by the National Security Council. If such materials are deemed to contain national security information, they will be marked appropriately and segregated.

Any materials which are found bearing national security markings but whose content has no relationship to national security can be deemed to be improperly classified and, after review by the National Security Council, the markings can be crossed out and the materials made available for public access.

Under the provisions of the Executive Order, materials which are properly classified can be declassified only after review and approval by the originating agency or consultation with the agency with the primary subject matter interest. However, the materials will become available for mandatory declassification review 10 years after the date of origin.

Any national security materials properly classified which appear, in the judgment of the reviewing archivist, to contain information relating to illegal acts will be referred under appropriate protection to the Special Prosecutor or his successor in function at the Department of Justice. [Emphasis added.]

From these statements, it appears that the archivists involved will be exercising some judgment as to whether a document is properly classified.

4. The proposed regulations at § 105-63.104 to implement Section 104 of the Act define Presidential Historical Materials to exclude "documentary materials of any type that are determined to be the official records of an agency of the Government." The Report, at G-3 states, however, that "official records of an agency as defined in 44 U.S.C. 3301, are by virtue of that authority the property of the Government and subject to the Administrator's [of GSA] custody and control." [Emphasis added.]

5. Individually, archivists will have the sole responsibility for the initial review and determination of those materials which are subject to restriction from public access (including classified materials). The restricted materials will be withdrawn from the collection and a notification substituted therefor describing the withdrawn materials and the basis for withdrawal. Decisions that cannot be made by the individual reviewing archivists will be referred to a Senior Archival Panel for decision. Decisions that cannot be made by this Panel will be referred to the Presidential Materials Review Board for decision. Descriptions of materials to be considered by the Board will be published in the Federal Register. The Report, at G-55, states that:

In practice, when the archivists find material which they believe may be improperly classified, or which should be classified, but is not so designated, they will refer the materials to the National Security Council for review and appropriate action.

6. Obviously, several matters here need clarification. First, are materials originated by the Agency official records of this Agency even if they are addressed to or distributed to those at the White House or the Executive Office Building? Second, what disposition will be made of official records of this Agency found in the 35,000 cubic feet of materials? Third, will the Agency participate in the decisionmaking process regarding the disposition of documents not originated by the Agency but concerning the Agency?

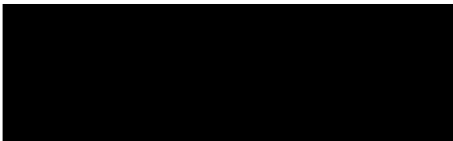
7. Several components within DDA (IRS, ISAS and OS) have responsibilities regarding the above matters. Accordingly, these matters are referred to your attention. A policy decision is required regarding whether the Agency finds the regulations acceptable as it applies to information originating in and

about the Agency or whether attempts to modify the regulations should be undertaken. For example, an attempt could be made--although probably difficult to effect--to refer all classified materials to the originating agency or the agency primarily concerned for a determination as to (a) proper classification and (b) the need to refer same to the Special Prosecutor or Department of Justice pursuant to 28 U.S.C.A. 535. Further, the Agency could take the position that the Administrator's authority under 44 U.S.C. 3301 is not unlimited with respect to Agency records in that 44 U.S.C.A. 2906 provides that:

The Administrator of General Services may inspect or survey personally or by deputy the records of any Federal agency, and make surveys of records management and records disposal practices in agencies. Officials and employees of agencies shall give him full cooperation in inspections and surveys. Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected or surveyed in accordance with regulation promulgated by the Administrator, subject to the approval of the head of the custodial agency.
[Emphasis added.]

Certainly a strong argument could be made that included within the scope of this section, are records classified pursuant to Executive order or those containing intelligence sources and methods information.

8. As policy decisions within your responsibility are required, these matters are referred to you. If this Office can assist, please advise.



Assistant General Counsel

STATINTL

cc: OLC